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# Torts -- Nondelegable Duty -- Direct and Vicarious Liability for Negligence

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Prosser states, "As to defendants other than sellers, who supply chattels under contract, there has as yet been no suggestion of any strict liability to third persons."[43] But considering that the law has expanded from liability for negligence where there is no privity[44] to strict liability in real estate[45] notwithstanding the doctrine of caveat emptor, the day may come when strict liability without privity will be applied to defendants other than sellers.[46]

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**Torts—Nondelegable Duty—Direct and Vicarious Liability for Negligence**

The plaintiff in a recent North Carolina case[1] recovered from the general concessionaire[2] of a county fair for injuries received when she was thrown from a carnival ride owned and operated by an independent contractor. The retaining bar of the ride was found to be difficult to close, and the independent contractor, not a defendant in the suit, was found to be negligent in failing to ascertain whether the retaining bar securing the plaintiff was closed and properly latched. The ride was determined to be "inherently dangerous,"[3] *i.e.*, that it was such a ride as was likely to cause injury to passengers unless due care was exercised in its maintenance and operation. The jury also found the defendant concessionaire negligent in failing to inspect the ride and its operation to see that it was maintained and operated with due care.

It is the general rule that an employer is not ordinarily liable for the negligent acts of his independent contractor; however this rule has numerous exceptions.[4] They are so numerous, in fact, that

[43] *Id.* § 98, at 685.

[44] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[45] 44 N.J. at —, 207 A.2d at 328.

[46] It must be noted that the Supreme Court of New Jersey held the defendant liable on the alternate grounds of negligence and implied warranty of habitability. The alternate holding of negligence may tend to minimize the import of the court's decision on implied warranty. Whether the court will follow this case as a precedent, where no negligence is alleged, remains to be seen.

[1] Dockery v. World of Mirth Shows, Inc., 264 N.C. 406, 142 S.E.2d 29 (1965).

[2] Hereinafter the terms concessionaire, employer, or owner will be used to designate the person who contracts with the independent contractor.

[3] 264 N.C. at 414, 142 S.E.2d at 35.

[4] 2 HARPER & JAMES, TORTS § 26.11 (1956); MECHEM, AGENCY §§ 480-90 (4th ed. 1952); PROSSER, TORTS § 70 (3d ed. 1964); RESTATEMENT (SECOND), TORTS §§ 409-29 (1965).

their very number casts doubt upon the validity of the rule.[5] Commentators group the exceptions under three broad categories:[6] (1) personal fault of the employer, (2) nondelegable duty of the employer, and (3) inherently dangerous or dangerous in the absence of special precautions.[7]

Cases comprising the first category are not genuine exceptions to the general rule because the employer is liable for his own failure[8] to exercise due care, not for the failure of an independent contractor. Such situations arise where he negligently selects an incompetent contractor,[9] provides defective equipment,[10] or negligently gives instructions pursuant to the work to be done.[11] A negligent failure to exercise control retained by him over the work will result in direct liability of the employer.[12]

The second category is comprised of those cases in which statutory duties,[13] duties created by charter or franchise,[14] or common

[5] "A number of factors concur to constitute . . . . such a powerful argument for the liability of the employer of an independent contractor that it would seem highly desirable for the courts to adopt the rule of liability and confine nonliability to a few exceptional cases." HARPER, TORTS § 292, at 646 (1933). See Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1935). *But see* Steffen, *The Independent Contractor and the Good Life*, 2 U. CHI. L. REV. 501 (1935).

[6] See authorities cited note 4 *supra*.

[7] These terms represent different forms of stating the same general principle. See Annot., 23 A.L.R. 1016 (1923); Annot., 23 A.L.R. 1084 (1923); RESTATEMENT (SECOND), TORTS §§ 416, 427 (1965).

[8] See HARPER, TORTS § 292, at 645 (1933). "In the cases in this category the employer's liability is clearly not vicarious but based on pure tort theory . . . ." MECHEM, AGENCY, § 482, at 332 (1952).

[9] See Huntt v. McNamee, 141 Fed. 293 (4th Cir. 1905) (applying North Carolina law); Baker v. Scott County Milling Co., 323 Mo. 1089, 20 S.W.2d 494 (1929); Mullich v. Brocker, 119 Mo. App. 332, 97 S.W. 549 (1905); Jolly Motor Livery Corp. v. Allenberg, 188 Tenn. 452, 221 S.W.2d 513 (1949); RESTATEMENT (SECOND), TORTS § 411 (1965).

[10] See, *e.g.*, Brady v. Jay, 111 La. 1071, 36 So. 132 (1904); Johnson v. J. I. Case Threshing Mach. Co., 193 Mo. App. 198, 182 S.W. 1089 (1916). Compare Mack v. Marshall Field & Co., 218 N.C. 697, 12 S.E.2d 235 (1940); Peters v. Carolina Cotton & Woolen Mills, Inc., 199 N.C. 753, 155 S.E. 867 (1930); Paderick v. Goldsboro Lumber Co., 190 N.C. 308, 130 S.E. 29 (1925); Royal v. Dodd, 177 N.C. 206, 98 S.E. 599 (1919); Midgette v. Branning Mfg. Co., 150 N.C. 333, 64 S.E. 5 (1909).

[11] See Starr v. Standard-Tilton Milling Co., 183 Ill. App. 754 (1913); Board of County Comm'rs v. Vickers, 62 Kan. 25, 61 Pac. 391 (1900); State Highway & Pub. Works Comm'n v. Diamond Transp. Corp., 226 N.C. 371, 38 S.E.2d 214 (1946); Embler v. Gloucester Lumber Co., 167 N.C. 457, 83 S.E. 740 (1914) (dictum); Persons v. Raven, 187 Ore. 1, 207 P.2d 1051 (1949).

[12] Bissel v. Ford, 176 Mich. 64, 141 N.W. 860 (1913); Allen v. Texas Elec. Serv. Co., 350 S.W.2d 866 (Tex. Civ. App. 1961).

[13] *E.g.*, Snyder v. Southern Cal. Edison Co., 44 Cal. 2d 793, 285 P.2d

law duties,[15] *i.e.*, duties that exist because of some special relationship between the employer and the plaintiff and those that exist because of the inherently dangerous character of the work, place the employer under a nondelegable duty. As in the first category, the employer may be liable for his own fault in these situations. Where it is reasonably foreseeable that harmful consequences will arise unless special precautions are taken, the employer may be subject to liability for his failure to inspect the work after it is finished[16] to see that it is in reasonably safe condition, or, on occasion, to see that proper precautions are taken on work in progress.[17] Where activities being carried on by an independent contractor on the employer's premises create unreasonable risks of bodily harm to those outside the premises, the employer may subject himself to liability for failure to exercise reasonable care to protect them.[18] Owners and occupiers of land who hire independent contractors to do work on their premises owe business invitees the common law duty of keeping their premises reasonably safe for the purposes of the visit.[19]

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912 (1955); Weber v. Buffalo Ry., 20 App. Div. 292, 47 N.Y. Supp. 7 (1897); Blount v. Tow Fong, 48 R.I. 453, 138 Atl. 52 (1927).

[14] *E.g.*, Dixie Stage Lines v. Anderson, 222 Ala. 673, 134 So. 23 (1931); Eli v. Murphy, 39 Cal. 2d 598, 248 P.2d 756 (1952); Brown v. L.H. Bottoms Truck Lines, Inc., 227 N.C. 299, 42 S.E.2d 71 (1947); Newsome v. Suratt, 237 N.C. 297, 74 S.E.2d 732 (1953), noted in *Agency, 1953 Survey of N.C. Law*, 32 N.C.L. REV. 379, 385 (1954).

[15] *E.g.*, Ferguson v. Ashkenazy, 307 Mass. 197, 29 N.E.2d 829 (1940) (landlord-tenant relationship and inherently dangerous activity); Corrigan v. Elsinger, 81 Minn. 42, 83 N.W. 492 (1900) (business invitee); Davis v. Summerfield, 133 N.C. 325, 45 S.E. 654 (1903) (adjacent property owners and inherently dangerous activity).

[16] McGuire v. Hartford Buick Co., 131 Conn. 417, 40 A.2d 269 (1944) (seller of used automobile failed to inspect tires negligently repaired by contractor); Rumetsch v. John Wanamaker, New York, Inc., 216 N.Y. 379, 110 N.E. 760 (1915) (corporate owner of department store failed to have elevator properly inspected). See RESTATEMENT (SECOND), TORTS § 412 (1965).

[17] Sheridan v. Rosenthal, 206 App. Div. 279, 201 N.Y. Supp. 168 (1923) (supervision of construction required). See Person v. Cauldwell-Wingate Co., 176 F.2d 237, 240 (2d Cir. 1949), "In such [inherently dangerous] cases the law imposes the duty of inspection upon the owner or contractor in invitum, and forbids him to delegate it . . . ."

[18] *E.g.*, Brown v. Gustafson, 264 Minn. 126, 117 N.W.2d 763 (1962); Lamb v. South Unit Jehovah's Witnesses, 232 Minn. 259, 45 N.W.2d 403 (1950); Hunter v. Southern Ry., 152 N.C. 682, 68 S.E. 237 (1910); Schwarts v. Merola Bros. Constr. Corp., 290 N.Y. 145, 48 N.E.2d 299 (1943), *affirming* 263 App. Div. 631, 34 N.Y.S.2d 220, *motion denied*, 289 N.Y. 756, 46 N.E.2d 357.

[19] *E.g.*, Turgeon v. Connecticut Co., 84 Conn. 538, 80 Atl. 714 (1911), It was the duty of the defendent to use reasonable care to keep every

The first genuine exceptions to the general rule of employer nonliability fall within this category of nondelegable duty.[20] These cases proceed on the theory that the employer is vicariously liable[21] for the independent contractor's acts of negligence that are not so remote from the contemplated risks as to be collateral.[22] Thus there is a nondelegable common-law duty to afford one's neighbor lateral support,[23] for landlords to maintain common approaches in reasonably safe condition,[24] for adjacent owners to refrain from obstructing the public way,[25] and to maintain one's premises in a reasonably safe condition for business invitees.[26] In effect, the neg-

part of the grounds to which it had invited the plaintiff in a reasonably safe condition, and to accomplish this end it was its duty to use reasonable care to see that the railway was so built, maintained, and operated as not to risk doing injury to any of its patrons while in the park.

*Id.* at 542, 80 Atl. at 715; Stickel v. Riverview Sharpshooters' Park Co., 250 Ill. 452, 95 N.E. 445 (1911); Thornton v. Main State Agricultural Soc'y, 97 Me. 108, 53 Atl. 979 (1902); Williams v. Charles Stores, Co., 209 N.C. 591, 184 S.E. 496 (1936); Smith v. Cumberland County Agricultural Soc'y, 163 N.C. 346, 79 S.E. 632 (1913) (dictum); E.S. Billington Lumber Co. v. Newport, 180 Okla. 407 (1937); Engstrom v. Huntley, 345 Pa. 10, 26 A.2d 461 (1942); Lineaweaver v. John Wanamaker of Philadelphia, 299 Pa. 45, 149 Atl. 91 (1930).

[20] HARPER, TORTS § 292, at 647 (1933).

[21] See Brown, *Liability for the Torts of Independent Contractors in West Virginia*, 55 W. VA. L. REV. 216 (1953); Comment, 44 CALIF. L. REV. 762 (1956); Comment, 39 YALE L.J. 861 (1930). See also Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584, 720 (1929); Morris, *The Torts of an Independent Contractor*, 29 ILL. L. REV. 339 (1935).

[22] See 2 HARPER & JAMES, TORTS § 26.11, at 1410 (1956); PROSSER, TORTS § 70, at 487 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 426 (1965); Smith, *Collateral Negligence*, 25 MINN. L. REV. 399 (1941).

[23] *E.g.*, Law v. Phillips, 136 W.Va. 761, 68 S.E.2d 452 (1952), 133 A.L.R.2d 95. In Davis v. Summerfield, 133 N.C. 325, 45 S.E. 654 (1903), the defendant-employer did the actual excavation that damaged plaintiff's building, but for the purpose of deciding whether an employer would be liable for the negligence of his independent contractor, the court assumed that the contractor performed the work. See RESTATEMENT (SECOND), TORTS § 422A (1965).

[24] Brown v. George Pepperdine Foundation, 23 Cal. 2d 256, 143 P.2d 929 (1943) (negligence of contractor imputed to the landlord); Russo v. Watson, 249 App. Div. 782, 292 N.Y. Supp. 249 (1936). See Annot., 162 A.L.R. 1111 (1946); RESTATEMENT (SECOND), TORTS § 421 (1965).

[25] *E.g.*, Goodwin v. Mason & Seabury, 173 Iowa 546, 155 N.W. 966 (1916); Cole v. City of Durham, 176 N.C. 289, 97 S.E. 33 (1918); Dunlap v. Raleigh, C. & S. R.R., 167 N.C. 669, 83 S.E. 703 (1914); McClure v. Neuman, 17 Ohio Op. 2d 483, 178 N.E.2d 621 (1961). See Carrick v. Southern Power Co., 157 N.C. 378, 72 S.E. 1065 (1911); Baily v. City of Winston, 157 N.C. 252, 72 S.E. 966 (1911).

[26] Daly v. Bergstedt, 267 Minn. 244, 126 N.W.2d 242 (1964); Corrigan v. Elsinger, 81 Minn. 42, 83 N.W. 492 (1900); Mayer v. Fairlawn Jewish Center, 38 N.J. 549, 186 A.2d 274 (1962) (concurrent negligence of the employer and the independent contractor),

Under the circumstances of this case [invitee], Center [the employer]

ligence of the independent contractor provides the plaintiff with a theory of recovery additional to or alternative with that of the personal fault of the employer.[27]

Cases where the activity is inherently dangerous comprise the third category.[28] To bring a case within this category, it is sufficient if there is an appreciable and foreseeable danger in relation to the particular circumstances.[29] Cases in which the employer would be absolutely liable, without fault, are included within this category.[30]

Since courts often state the personal fault and the inherently dangerous cases in terms of nondelegable duty,[31] the question arises whether the grouping into categories is not more verbal than real. The term "nondelegable duty" essentially expresses the underlying concept of all the so-called exceptions to the general rule of employer immunity for the negligence of his independent contractor.[32]

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had a non-delegable duty for the safety of persons using the premises at its invitation. If while repairs or structural alterations were going on, a dangerous condition was created which resulted in injury to an invitee, liability for damages would exist. And with respect to that liability it would be immaterial whether the construction work was being performed by Center's own employees or by an independent contractor. *Id.* at 555, 186 A.2d at 277; Eide v. Skerbeck, 242 Wis. 474, 8 N.W.2d 282 (1943) (tent peg too far out in midway of fair),

Wherever an owner or operator of a place of amusement leaves to an independent contractor the performance of a duty which under the law he is obligated to perform himself, he is liable for the negligent act of a servant of the independent contractor to the same extent as if the negligent act had been done by a servant directly in his employ.

*Id.* at 481-82, 8 N.W.2d at 285. Justice Ruffin in a dissent to the early case of Wiswall v. Brinson, 32 N.C. 554, 564-79 (1849), stated the rules with respect to the liability of an owner or occupier of land for dangerous conditions on their premises, whether the work was done by a servant, himself, or an independent contractor.

[27] See RESTATEMENT (SECOND), TORTS, Introductory note, § 409 (1965).

[28] See 2 HARPER & JAMES, TORTS § 26.11, at 1408 (1956); MECHEM, AGENCY, §§ 487-90 (4th ed. 1952); PROSSER, TORTS § 70, at 484 (3d ed. 1964); RESTATEMENT (SECOND), TORTS §§ 416, 427 (1965).

[29] Evans v. Elliott, 220 N.C. 253, 17 S.E.2d 125 (1941).

[30] The case of Rylands v. Fletcher, L.R. 3 H.L. 330 (1868), the building stone for absolute liability for abnormally dangerous instrumentalities and activities, was itself a case involving an independent contractor. See Allied Hotels, Ltd. v. Barden, 389 P.2d 968 (Okla. 1964) (diversion of surface water); Guilford Realty & Insurance Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963) (blasting). See generally PROSSER, TORTS §§ 74-79 (3d ed. 1964).

[31] See Annot., 23 A.L.R. 1084 (1923); Annot., 23 A.L.R. 1016 (1923); RESTATEMENT (SECOND), TORTS §§ 416, 427 (1965); 2 HARPER & JAMES, TORTS § 26.11, at 1408 (1956).

[32] Apparently, this is the rationalization used by the North Carolina court. See Evans v. Elliott, 220 N.C. 253, 17 S.E.2d 125 (1941); Thomas

Included within this term would be all the categories enumerated above, including those previously termed inherently dangerous and personal fault. The essential idea is that these are situations in which an employer may not contract away his liability.[33]

The facts in *Dockery*[34] would support both direct and vicarious liability. The employer breached his nondelegable duty to inspect and supervise operation of the ride. Negligence of the independent contractor in operating the inherently dangerous ride could have been imputed to the defendant. Nevertheless, the court chose to express the employer's liability in terms of a breach of his own duty.

A question is thus raised whether the court recognizes the independent contractor's negligence as a basis of employer liability in addition to that predicated on the personal fault of the employer. In addition to *Dockery,* another important North Carolina case deals with this question.[35]

In *Evans v. Elliott,*[36] the court stated that the employer's liability was direct, original, and independent, not derivative.[37] It further stated that "the contractor may, of course, be liable for the same want of due care in not taking the necessary precautions, *for the omission of which the employer becomes liable.*"[38] In *Dockery,*[39] the court stated that the

> liability of such owner or general concessionaire is based *either* upon his nondelegable duty to maintain a reasonably safe place for the patrons, in accord with which he must answer for the negligence of the sub-concessionaire . . . in rendering the premises and devices unsafe, *or* merely upon the general ground that such owner or general concessionaire is responsible for his breach of duty to keep the premises, including the devices, reasonably safe, without reference to any separate act or omission of the sub-concessionaire.[40]

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v. Hammer Lumber Co., 153 N.C. 351, 69 S.E. 275 (1910); Davis v. Summerfield, 133 N.C. 325, 45 S.E. 654 (1903).

[33] Prosser states that, "these exceptions making the employer liable overlap and shade into one another; and cases are comparatively rare in which at least two of them do not appear." PROSSER, TORTS § 70, at 481 (1965).

[34] 264 N.C. 406, 142 S.E.2d 29 (1965).

[35] Evans v. Elliott, 220 N.C. 253, 17 S.E.2d 125 (1941).

[36] *Ibid.*

[37] *Id.* at 259, 261, 17 S.E.2d at 129, 130.

[38] *Id.* at 259, 17 S.E.2d at 129. (Emphasis added.)

[39] 264 N.C. 406, 142 S.E.2d 29 (1965).

[40] *Id.* at 411, 142 S.E.2d at 33. (Emphasis added.)

It is therefore clear that an employer in North Carolina may be vicariously liable for the negligence of his independent contractor.

As a practical matter, this means that the plaintiff in an action against the employer has at least two, possibly three, theories of recovery. He may formulate the issue with respect to the personal fault of the employer and have the jury instructed accordingly.[41] In addition, the plaintiff may plead, offer proof, and have the jury instructed on the negligence of the independent contractor that may be imputed to the employer.[42] When the activity contracted for is

[41] In *Dockery,* the following portion of the judge's instructions with respect to the negligence of the defendant certainly opens to question whether the jury was actually instructed on his personal fault: "[A]nd such failure by . . . [the independent contractor] would be attributed as a matter of law to . . . the defendant, and that such failure of World of Mirth to inspect and supervise was a proximate cause of plaintiff's injuries . . . ." *Id.* at 411, 142 S.E.2d at 33. The first portion of the instruction, beginning with the word "and" and ending at the word "defendant," has no antecedent in the instruction. For further comment on this part of the instruction see note 42 *infra.* The latter portion of the instruction fails to submit the personal negligence of the defendant to the jury, but is tantamount to a directive by the judge to find the defendant liable. It is submitted that it was not the intention of the court to impose absolute liability on the operators of amusement rides.

An interesting point is raised in RESTATEMENT (SECOND), TORTS § 416, Illustration 3f (1965). Essentially the rule is that when the work is dangerous in the absence of special precautions (or inherently dangerous) and the independent contractor exercises reasonable care but the harm happens anyway, that the employer will not be liable merely because the precautions taken by the contractor proved to be ineffectual. "In order that the employer be subject to liability, it is necessary that the contractor fail to exercise reasonable care to take adequate precautions."

It is submitted that, logically, this rule should apply to all cases where the employer is under a nondelegable duty and the independent contractor exercises reasonable care with harm resulting, this being true whether or not the employer actually supervised or inspected the operations of the independent contractor. However, the employer may be subject to liability within those exceptions set out in notes 14, 15, 16, and 17 *supra,* dealing with personal fault of the employer.

[42] In *Dockery,* the independent contractor's negligence was the first issue submitted to the jury. Logically, this is the missing antecedent referred to in note 41 *supra.* If this is a correct interpretation, then it is reasonable to say that the employer was held liable for the negligence of his independent contractor, not his own personal fault. Admittedly the same result is reached, but this illustrates the problems that exist in formulating the proper issues and having the jury instructed accordingly.

This problem is further pointed out in *Evans.* It was ruled that the relationship of employer-independent contractor existed as a matter of law; however the issue of the independent contractor's negligence was not submitted to the jury. After holding that it was error to instruct that the employer had the burden to show that the work did not fall into the exceptions where the employer would not be liable, the court stated,

> [W]e think it was error to instruct the jury on the relation of master and servant, and the negligence which might be imputed to the de-

so dangerous in relation to the particular circumstances as to be ultrahazardous in nature, the plaintiff may also seek to hold the defendant-employer absolutely liable regardless of fault.[43]

It can be safely concluded that in North Carolina a plaintiff will recover from the employer of an independent contractor who is under any of the nondelegable duties enumerated in the preceding discussion. However, the determination of this question does not necessarily determine the issue of who—the employer or the independent contractor—will ultimately bear the financial burden of the plaintiff's judgment.

C. RALPH KINSEY, JR.

**Torts—Successive Automobile Collisions—Joint and Several Liability**

That joint tort-feasors are jointly and severally liable[1] for the injuries caused by their negligence and can be joined in the same action by the injured party is a basic principle of law accepted by most jurisdictions.[2] Generally, joint tort-feasors are persons who

fendant on that theory, and upon the principle of agency or respondeat superior, a relation which as the evidence now stands did not exist.

*Id.* at 261, 17 S.E.2d at 130. The writer is not certain of the ramifications of this language and recognizes that any attempted explanation is conjectural. However, one possible explanation may be that the plaintiff failed to formulate the issue with respect to the negligence of the independent contractor. This is based on the following language used by the court: "The contractor may, of course, be liable for the same want of due care in not taking the necessary precautions, for the omission of which the employer becomes liable. . . ." *Id.* at 259, 17 S.E.2d at 129.

[43] There should be no problem in joining this cause of action with that for negligence under N.C. GEN. STAT. § 1-123 (1953). The plaintiff may be presented with the problem of election of remedies. However, these alternative theories do not appear to be inconsistent, and it is submitted that the plaintiff should be allowed to have them submitted to the jury as alternative, provided, of course, the evidence in the case warrants it. See Brandis, *Civil Procedure (Pleadings and Parties)*, 43 N.C.L. REV. 871, 877 (1965); Brandis, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N.C.L. REV. 405 (1956); Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. REV. 1 (1946); *Civil Procedure, Eleventh Annual Survey of N.C. Case Law*, 42 N.C.L. REV. 600, 612 (1964); *Civil Procedure, Ninth Annual Survey of N.C. Case Law*, 40 N.C.L. REV. 482, 491 (1962); Note, 13 N.C.L. REV. 226 (1935). In federal practice the plaintiff would be able to join both claims for relief and would not be put to an election of remedies. FED. R. CIV. P. 8(e)(2).

[1] See, *e.g.*, Harward v. General Motors Corp., 89 F.Supp. 170 (E.D.N.C. 1950); White v. Carolina Realty Co., 182 N.C. 536, 109 S.E. 564 (1921).

[2] See, *e.g.*, Phoenix Ins. Co. v. The Atlas, 93 U.S. 302 (1876); Van